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No. 11,329

In The

United States Circuit Court of Appeals For the Ninth Circuit

GETCHELL MINE, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIEF FOR THE UNITED STATES

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CITATIONS

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OPINION BELOW

The opinion of the District Court (R. 21-25) is reported in 83 F. Supp. 774.

JURISDICTION

This appeal involves a claim for refund of $6,108.73, with statutory interest thereon (R. 5), which includes $5,003.62 federal transportation tax and $1,105.11 accrued interest thereon paid to the appellee on March 4, 1946 (R. 4, 13, 23). Claim for refund was timely filed on or about July 1, 1946, and denied by the Commissioner of Internal Revenue on October 2, 1946. (R. 17, 23). Suit for refund was filed in the

District Court on March 1, 1947 (R. 2-12), conformably with Section 3772 of the Internal Revenue Code. The District Court had jurisdiction of the case under Section 24, Twentieth, of the Judicial Code, now 28 U. S. C., Section 1346. The judgment of the District Court was entered January 24, 1949. (R. 26). A motion for a new trial was denied June 15, 1949. (R. 27-28). Notice of appeal was filed July 29, 1949 (R. 26-27), conformably with 28 U. S. C., Section 1291, upon which the jurisdiction of this Court rests.

QUESTION PRESENTED

Whether payments made by the taxpayer to an independent contractor, engaged in the business of transporting property for hire, for services rendered during the period December 1, 1942, to April 30, 1944, inclusive, in hauling by motor vehicles or trucks quantities of gold and tungsten ores over private roads which were owned, built, and maintained by the taxpayer upon property which it owned in fee simple,* constituted an amount paid for the transportation of property by motor vehicle from one point in the United States to another within the meaning of Section 3475(a) of the Internal Revenue Code.

STATUTE AND REGULATIONS INVOLVED

The applicable statute and Regulations are set forth in an Appendix, *infra*.

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*Excepting only that part of the hauling of ores for a distance of approximately one mile was over a road built and maintained by the taxpayer upon land owned by the United States of America.

STATEMENT

The facts, which were stipulated (R. 14-19), and found by the District Court (R. 21-25), may be summarized as follows:

Taxpayer is a Nevada corporation operating a mining property known as the "Getchell Mine" in Humboldt County, Nevada. In the course of its mining operations, the taxpayer extracts and moves tungsten and gold ores from natural deposits in the earth to surface ground. Such ores must then be removed and transported to its mill for treatment. Under an oral contract with another Nevada corporation, Dodge Construction, Inc., the latter removed from surface ground by the use of power shovels and transported by motor trucks taxpayer's ore from spots near the mine mouth to designated stockpiles or to the taxpayer's mill for treatment. All of such transportation took place on private roads owned, built, and maintained by the taxpayer upon properties acquired by it prior to 1937 and owned by it in fee simple, except that during part of the hauling of ore from the Granite Creek Mine to the Getchell mill the ore was transported over a road built and maintained by the taxpayer for a distance of approximately one mile across part of a section of land owned by the United States of America. For such removal and transportation Dodge Construction, Inc., was paid sums ranging from 25c to $1 per cubic yard, depending on the distance ore was transported, which varied from 300 feet to seven miles. (R. 15-16).

On and after December 1, 1942, up to and including April

30, 1944, Dodge Construction, Inc., transported quantities of tungsten and gold ore under its contract with the taxpayer who paid therefor the sum of $166,787.31. In the performance of its contract and in the transportation of the ore, Dodge Construction, Inc., was an independent contractor engaged in the business of transporting property for hire. The Commissioner of Internal Revenue determined a federal transportation tax of $5,003.62 to be due upon the sum paid by the taxpayer, as aforesaid. This tax, together with interest amounting to $1,105.11, aggregating $6,108.73, was thereafter duly and regularly assessed and paid by the taxpayer on March 4, 1946. (R. 16-17).

The taxpayer filed a formal claim for refund on or about July 1, 1946, to recover its payment of $6,108.73. That claim was denied by the Commissioner of Internal Revenue on October 2, 1946. (R. 17).

The District Court denied recovery to the taxpayer, holding that there was transportation of property by Dodge Construction, Inc., within the meaning of Section 3475 of the Internal Revenue Code, or the Regulations thereunder, and that the tax in question was legally assessed and collected. (R. 25). The District Court's findings of fact include the following (R. 23):

> 4. That on and after December 1, 1942, the effective date of section 3475(a) of the Internal Revenue Code, and up to and including April 30, 1944, Dodge Construction, Inc., transported under such contract divers quantities of tungsten and gold ores under the terms of the contract and received payment therefor from plaintiff in the sum of $166,787.31. That in the performance of said contract and the transportation of

said ores, Dodge Construction, Inc., was an independent contractor and was engaged in the business of transporting property for hire within the meaning of Section 3475, Title 26, United States Code.

SUMMARY OF ARGUMENT

The federal transportation tax effective December 1, 1942, was imposed upon amounts thereafter paid within the United States for transportation services rendered in the United States on or after that date by a person who was in the business of transportating property for hire. Section 3475 (a) of the Internal Revenue Code, as added by Section 620(a) of the Revenue Act of 1942. The statute enacted and the transportation tax levied as part of a wartime Revenue Act which included many other taxes upon new sources of revenue and the enlargement of taxes upon existing sources. A similar tax was imposed by Section 500 of the Revenue Acts of 1917, c. 63, 40 Stat. 300, and 1918, c. 18, 40 Stat. 1057.

Under the agreed and stipulated facts as they were adopted in the District Court's findings of fact, there can be no question now as to whether (1) there was transportation (2) of property (3) by trucks or motor vehicles (4) from one point in the United States to another (5) and payment therefor made in the United States by the taxpayer to (6) a person engaged in the business of transporting property for hire. Normally it would follow, as the District Court held, that the controverted tax was due and owing from the taxpayer to the United States. If due, there is no question that it was lawfully collected.

The taxpayer's arguments, believed to be without merit, suggest exceptions to or imply exemptions in what seems to be the plain meaning from a literal reading of the applicable statutory language. One argument rests upon the assumed premise that all of the transportation of the taxpayer's ore by Dodge Construction, Inc., was simply an incidental part of its mining operations; that the removal and hauling of ore from a mine mouth to a mill or stockpile is merely an inter-industry act and a step in the manufacturing process; and that, therefore, the admitted transportation was not taxable transportation as such but a movement of property exempt from tax. Another alternative argument, applicable even if the transportation in question might otherwise properly have been subjected to tax, is based upon the premise that there can be no material difference or distinction in the use of the words "point," "place," or "spot" so that any and all transportation upon the taxpayer's property known as the Getchell Mine occurred within the confines of a single place, point, or locality. This means that the statutory phrase "from one point in the United States to another" never applies to transportation by motor vehicle upon or across a taxpayer's property. Each argument suggests an implied exemption to the ordinary meaning of the statutory language that is plainly stated. Both arguments propose exceptions to what otherwise clearly is the intent of ordinary words in common and constant use.

ARGUMENT

I

Amounts paid within the United States after December 1, 1942, to persons engaged in the business of transporting property for hire, for transportation of property by motor vehicle in the United States on or after that date (excepting certain transportation of coal), have been subject to the federal transportation tax.

For the purposes of this argument, the material portion of the applicable statutory language may be restated as follows: There shall be imposed upon the amount paid to a person, engaged in the business of transporting property for hire, for the transportation of property by motor vehicle from one point in the United States to another, a tax. The term "transportation" is defined in Section 143.1(d) of Treasury Regulations 113 (Appendix, *infra*), to include local movements of property, and loading and unloading services furnished in connection with a transportation movement.

There is no basis for giving a restricted meaning to the statutory language. The term "transportation *** of property by *** motor vehicle" is all-inclusive and certainly is broad enough to include all movement of property by truck, whether upon privately owned land or upon public highways, and regardless of the purpose or reason for the transportation, where the transportation is done by a person engaged in that business. The Regulations are clearly within the statute in providing that the language includes purely local movements including loading, unloading, and transfer

in transit. Under neither the statute nor the Regulations is there a basis for excluding from the tax any transportation of property by a person engaged in the business of transporting property for hire, and this is true where such transportation is incidental to a continuing process of manufacture, or mining and milling.

The situation in this case comes precisely within the language of the statue and Regulations. Dodge Construction, Inc., a person engaged independently in the business of transporting property for hire, carried taxpayer's ore by truck from its mine to designated stock piles or to its mill for treatment. The ore was loaded at the mill, the point of origin, and transported to the point of destination, where it was unloaded. There was thus transportation from one point or place to another, irrespective of the fact that both points may have been on its property and irrespective of the fact that the reason for the transportation was to stockpile the ore or to prepare it for market.

The following discussion will confirm that the statutory language is not to be circumscribed, and that the Regulations are a valid interpretation of the statute. It will also show more fully that the taxpayer's arguments (1) that there was no transportation of its ore in the statutory sense because the transportation was an incident of processing the ore for sale, and (2) that in any event there was no transportation from one point to another where the ore did not leave its property, are without merit.

As stated above, the applicable statutory language is part of a wartime Revenue Act which was passed by Congress

and approved by the President in 1942 to raise additional federal taxes from old sources and more tax from new sources, all necessary for successful participation in World War II. Similar legislation, referred to above as having been enacted in 1917 and 1918, was likewise part of an attempt to increase federal tax revenues during World War I. It seems reasonable to conclude that Congress had in mind reaching as a source of more tax all transportation of all property, except that which was expressly excluded. Members of Congress and of its Committees are presumed to have known that many taxpayers who were their constituents regularly and customarily hired transportation of property to, upon, and away from their premises. Farmers used public transportation, especially by motor trucks, for grain, hay, livestock, and timber. Merchants paid for transportation of goods to and from their places of business and warehouses by motor trucks, railway, and water. Manufacturers paid for similar types of transportation of raw and finished goods to and away from their factories, upon and across their premises. Other mining companies operated under conditions similar to those in the instant case. The situation was one of general application and of material importance both to the Government and to taxpayers in 1942. The statute was unquestionably intended to create an added burden upon an established class of taxpayers who had paid no such excise tax except during World War I. This statute is still in effect.

There ordinarily can be no justification for a narrow construction of statutory language in a revenue measure intended to raise more tax money for war. No matter how

burdensome the tax may be, there is every reason properly to say that the literal reading of the language used is the only correct answer to a question as to what it was intended to mean. The subject of all construction is to ascertain the legislative intent and "If the language be clear it is conclusive." *Osaka Shosen Line* v. *United States,* 300 U.S. 98, 101, citing *United States* v. *Hartwell,* 6 Wall. 385, 396. It matters not that such construction operates to the disadvantage of one or more taxpayers and to some extent imposes an economic impediment to the activity taxed as compared with others not taxed. It is settled "and it has long been established that an Act of Congress which on its face purports to be an exercise of the taxing power is not any the less so because the tax is burdensome or tends to restrict or suppress the thing taxed." *Sonzinsky* v. *United States,* 300 U. S. 506, 513. Taxpayer might have avoided the tax by the use of its own trucks or by leasing from Dodge Construction, Inc., the trucks which were used, under a rule in M.T. 9, 1943 Cum. Bull. 1159, and a decision in *Ohio River Sand Co.* v. *United States,* 60 F. Supp. 563 (W.D. Ky.).** However, present knowledge that a taxpayer might have lawfully avoided a tax by using another form of transaction "furnishes no reason for relieving him of tax when, for whatever reason, he chooses a mode of dealing within the terms of the Act." *Founders General Co.* v. *Hoey,* 300 U. S. 268, 275. Equality in taxation and questions of "equal protection must be decided in respect of the general classification rather than by the chance incidence of the tax in

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** Cf. **Bridge Auto Renting Corp. v. Pedrick,** 174 F. 2d 733, 737-738, (C.A. 2d), certiorari denied October 17, 1949, which limits this rule to the rental of trucks without drivers.

particular instances or with respect to particular taxpayers." *Colgate* v. *Harvey,* 296 U. S. 404, 436.

There is a well recognized principle of statutory construction applicable in federal tax cases that a taxing statute of doubtful intent should be construed favorably to a taxpayer. The following excerpt from *Gould* v. *Gould,* 245 U. S. 151 153, is frequently cited as the leading statement of the rule:

> In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the Government, and in favor of the citizen.

This rule is never applied when the statute is free from doubt (*Hecht* v. *Malley,* 265 U.S. 144, 156), and it is only applied in situations of extraordinary doubt (*United States* v. *Wetherell,* 65 Fed. 987, 990 (C.A. 1st)). Morover, in *White* v. *United States,* 305 U.S. 281, 292, the Court said:

> We are not impressed by the argument that, as the question here decided is doubtful, all doubts should be resolved in favor of the taxpayer. It is the function and duty of courts to resolve doubts. We know of no reason why that function should be abdicated in a tax case more than in any other where the rights of suitors turn on the construction of a statute and it is our duty to decide what that construction fairly should be.

The Government submits that the statutory language determinative of any issue in the instant case, particularly the word "point," is free from reasonable doubt. The fol-

lowing excerpt from *Helvering* v. *Stockholms &c. Bank,* 293 U.S. 84, is apposite in the circumstances (pp. 93-94):

> In the foregoing discussion, we have not been unmindful of the rule, frequently stated by this court, that taxing acts "are not to be extended by implication beyond the clear import of the language used," and that doubts are to be resolved against government and in favor of the taxpayer. The rule is a salutary one, but it does not apply here. The intention of the lawmaker controls in the construction of taxing acts as it does in the construction of other statutes, and that intention is to be ascertained, not by taking the word or clause in question from its setting and viewing it apart, but by considering it in connection with the context, the general purposes of the statute in which it is found, the occasion and circumstances of its use, and other appropriate tests for the ascertainment of the legislative will. Compare *Rein* v. *Lane,* L. R. 2 Q. B. Cases 144, 151. The intention being thus disclosed, it is enough that the word or clause is reasonably susceptible of a meaning consonant therewith, whatever might be its meaning in another and different connection. We are not at liberty to reject the meaning so established and adopt another lying outside the intention of the legislature, simply because the latter would release the taxpayer or bear less heavily against him. To do so would be not to resolve a doubt in his favor, but to say that the statute does not mean what it means.

It is also well established that Regulations have the force and effect of statute law if they are reasonable and come within the law with respect to which they are issued. *Commissioner* v. *Wheeler,* 324 U.S. 542, 547; *Maryland Casualty Co.* v. *United States,* 251 U.S. 342, 349. Of course, a regulation which does more than seek to carry out the intent of Congress and therefore alters or amends the law is without force or effect. *Manhattan Co.* v. *Commissioner,* 297 U.S.

129. But it has long been the settled rule that a practical interpretation of an ambiguous or doubtful statute that has been acted upon by officials charged with its administration will not be disturbed except for weighty reasons. *Brewster* v. *Gage,* 280 U.S. 327, 336; *National Lead Co.* v. *United States,* 252 U.S. 140, 145-146; *Carlisle* v. *Commissioner,* 165 F. 2d 645, 648 (C.A. 6th). Moreover, in *Brewster* v. *Gage, supra,* the United States Supreme Court said (p. 337):

> The substantial reenactment in later Acts of the provision theretofore construed by the department is persuasive evidence of legislative approval of the regulation.

See also *Commissioner* v. *Wheeler, supra,* p. 547, footnote 10. The Regulations applicable in the instant case have been in effect from February 1, 1943, and Congress has since amended the Internal Revenue Code several times. One of these amendments in Section 307(a)(9) of the Revenue Act of 1943, c. 63, 58 Stat. 21, expressly related to Section 3475(b), which was also amended by the Act of November 4, 1943, c. 294, 57 Stat. 585, and further amended by Section 6 of the Act of December 29, 1945, c. 652, 59 Stat. 671. None of the changes are material to any argument in the instant case.

The applicable Reuglations are certainly not unreasonable. They surely are not inconsistent with the statutory language. They constitute contemporaneous construction by those charged with the administration of the statute. They do apply to purely local movements of property including "switching," which may and often does take place entirely upon the property of a taxpayer. Section 143.1(d),

Treasury Regulations 113. There are no reasons, weighty or otherwise, which warrant a conclusion that the transportation in the instant case was not taxable transportation. The Regulations apply in the circumstances here and they should be sustained under the rule in *Commissioner* v. *South Texas Co.,* 333 U.S. 496, 501, namely:

> This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous constructions by those charged with administration of those statutes which should not be overruled except for weighty reasons.

If the language of Section 3475 of the Internal Revenue Code is clear and not of doubtful meaning, then it applies to the undisputed facts in this case. There was taxable transportation upon which the federal tax has been lawfully collected. The judgment below should be affirmed. The same conclusion follows even if it be assumed, *arguendo,* that some words in this statute might have doubtful meaning. The rule stated in *Great Northern Ry. Co.* v. *United States,* 315 U.S. 262, is applicable (p. 273):

> But we are not limited to the lifeless words of the statute and formalistic canons of construction in our search for the intent of Congress. The Act was the product of a period, and, "courts, in construing a statute, may with propriety recur to the history of the times when it was passed."

The taxpayer's claim for exemption from transportation tax cannot rest upon mere implication. *Oklahoma Tax Comm'n* v. *United States,* 319 U.S. 598, 606; *United States* v. *Stewart,* 311 U.S. 60, 71; *U. S. Trust Co.* v. *Helvering,* 307 U.S. 57, 60. Taxpayer's argument (Br. 24) that the

provisions of Section 143.13(b) (Appendix, *infra*) "created an exemption from the tax on transportation in the case of transportation of coal from the mine to a preparation plant," has no application to any issue in the instant case. The conclusion (Br. 25) that "No more reason exists for the taxation of transportation of raw ores from a mine to a mill all located on the same premises than exists in the taxation of the movement of coal from the mine to a preparation plant" may well be true in theory, but it disregards what Congress provided. Congress saw fit to grant different, and even what may be termed preferential, treatment to coal producers. Section 3475(a) of the Internal Revenue Code imposes a tax generally upon amounts paid for transportation of property of "3 per centum of the amount so paid," but in the same sentence further provides, "except that, in the case of coal, the rate of tax shall be 4 cents per short ton." The last sentence in Section 3475(a) reads: "The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation." This means that a particular quantity of coal is subject to a tax of 4c per short ton, imposed as an excise for the transportation of that coal. Such tax applies but once to any short ton of coal, regardless of when, where, how short or how far a distance, or how many times it may be transported. This distinction is important.

Granting that there may be a similarity between the

physical process of transporting the taxpayer's ores and another taxpayer's coal the applicable statute and Regulations clearly require a different treatment. With respect to the tax on coal transportation, the law presented an administrative problem for the Commissioner of Internal Revenue in that he was obliged to determine by regulation at what point in transportation or at what time the tax of 4c per short ton would apply. This is covered in Section 143.13(b), providing in substance that the tax applies to the first transportation for hire which takes place after the coal has been prepared for commercial use. The statutory language is plain and the provisions in the Regulations relating thereto are reasonable. There never has been any basis for a similar treatment of any property other than coal. Taxpayer's argument is of no avail in the circumstances here.

Granting also that the wisdom of such legislation might be questioned upon the ground that it affords preferential treatment to one class of taxpayers, this relates to a matter of policy. This is a matter as to which the Court will have no concern. *Packard Co.* v. *National Labor Relations Board,* 330 U.S. 485, 490-493.

II

Amounts paid within the United States since December 1, 1942, to a person engaged in the business of transporting property for hire, for the transportation by motor truck of gold and tungsten ore in the United States on or after that date, have been subject to the federal transportation tax.

Taxpayer first argues that the transportation of ore under the facts in this case was a nontaxable movement of property for the reason that it (Br. 16) "was merely a part of and incidental to the mining operations," and says (Br. 17):

> The removal from the earth and the transportation to the mill were a part and parcel of the production by appellant of a final product designed for sale.

Taxpayer construes the applicable statute to tax only (Br. 23-24)—

> transportation which is essentially a movement of property in commerce, a movement of property to or from a market, and not movements of property which are basically a part of the production of goods for commerce and for market.

The mere fact that the transportation in question was an integral part of a mining operation and a movement upon and across the taxpayer's own premises cannot be important. Otherwise taxpayer's argument has general application to all mining, to industry and to argiculture. Commercial transportation of automobile parts from manufacturing plants to an assembling plant; of prefabricated materials and unassembled parts of machinery; of cattle, hay, grain, and other farm products includes movement by motor vehicles and railroad cars upon private as well as

public property. Such transportation of ore, auto parts, and cattle, under taxpayer's argument, could be a movement from one unit of a business to another unit of the same business and a part of, or incidental to, the production of goods for commerce and for market. Taxpayer's argument, if sound, is obviously important not only to taxpayers generally but to the federal revenue.

It may be conceded, *arguendo,* that the movement of the taxpayer's ore upon its own premises was an inter-industry act, a step in the manufacturing process, an incidental part of its mining operations, and and essential part of its mining business. It does not follow therefrom that there was no taxable transportation or that the tax in controversy was one imposed upon the taxpayer's mining operations. The movement of ore from mine to mill was "transportation" of "property" within the plain meaning of the law and Regulations. Congress made no exception in favor of the mining industry. The Commissioner of Internal Revenue was powerless to do so by Regulations. The fact that Congress did provide for different treatment of the coal industry supports a conclusion that no exemption was intended to apply to other kinds of mining operations. Neither is there any basis for a presumption that Congress intended the transportation tax to apply only to payments for movements of finished or commercially salable products of mines nor, when transported by motor vehicles, only to movements upon public highways or off of the taxpayer's own premises. Taxpayer's argument goes to a policy matter concerning the wisdom of the legislation which is of no concern in a construction of the language actually used.

Packard Co. v. *National Labor Relations Board,* 330 U.S. 485. The following excerpt from the opinion in *Utah Junk Co.* v. *Porter,* 328 U.S. 39, is particularly apposite (p. 44):

> All construction is the ascertainment of meaning. And literalness may strangle meaning. But in construing a definite procedural provision we do well to stick close to the text and not import argumentative qualifications from broad, unexpressed claims of policy. Insofar as such considerations are revelant here, however, they tell against cutting down the natural meaning of the language Congress chose.

Taxpayer's argument ignores the one essential fact that is of controlling importance. The taxpayer's problem arose simply and solely because it paid to a commercial carrier, or a person engaged in the business of transporting property for hire, charges for trucking its ore. The taxpayer could have purchased and used its own trucks to transport that ore, or it could have rented trucks owned by others. In either event, no tax would have attached to the movement of its property with such equipment.

The pipeline cases cited by taxpayer (Br. 18, 20) are not apposite. Regulations applicable to the transportation of oil by pipeline expressly provided that the tax did not apply to any transportation which was incidental to production. They also exempted transportation which was incidental to manufacturing and refining operations. Taxable movements of oil must also have been similar to movements which pipeline carriers usually undertake and perform. There are no comparable Regulations or administra-

tive rulings applicable in the instant case. This material difference appears on page 925 of the opinion in *Jones* v. *Continental Oil Co.,* 141 F. 2d 923 (C.A. 10th), cited on page 20 of taxpayer's brief. It appears even more clearly in cases cited on page 926 of the *Continental Oil Company* opinion, particularly *McKeever* v. *Fontenot,* 104 F. 2d 326 (C.A. 5th); *Caminol Co.* v. *United States,* 41 F. Supp. 819 (S.D. Cal.); *Big Lake Oil Co.* v. *Driscoll,* 40 F. Supp. 510 (W.D. Pa.); *Mohawk Petroleum Co.* v. *Lewis,* 19 F. Supp. 867 (N.D. Cal.). These decisions expressly refer to Regulations promulgated under the Revenue Act of 1932, c. 209, 47 Stat. 169, and prior to the enactment of the Internal Revenue Code. The case of *Alexander* v. *Carter Oil Co.,* 53 F. 2d 964 (C.A. 10th), cited on page 18 of the taxpayer's brief, arose under the Revenue Act of 1918, and shows that (p. 966) there was an administrative ruling which exempted from tax all transportation of oil which was incidental to the taxpayer's production or refining business. Moreover, the tax on transportation of crude petroleum did apply to transportation upon the taxpayer's own premises. *Magnolia Petroleum Co.* v. *United States,* 53 F. Supp. 231 (CCls.), certiorari denied, 323 U.S. 721. Moreover, as is made clear in *Continental Oil Co.* v. *Jones,* 176 F. 2d 519 (C.A. 10th), the 1942 edition of the Regulations relating to transportation of oil by pipeline, which the court held valid, provides for taxation where the movement is from stablization plants at the wells to storage tanks, and this irrespective of whether such movement is an incident of production and whether it occurred on the taxpayer's premises.

III

The statutory phrase "from one point in the United States to another" covered transportation upon and across land owned by the taxpayer.

The definition of the word "point," quoted on page 26 of the taxpayer's brief, appears in Webster's New International Dictionary (1949 ed.) p. 1903. Even though the words "point" and "place" may be synonymous, the Government cannot accept the conclusion that (Br. 27)—

> The Getchell Mine was, therefore, a place or point and all of the transportation by Dodge occurred within the confines of a single place, point or locality and there was no transportation from one point in the United States to another.

The point of origin and the point of destination of any commercial shipment varies with the type of transportation. Railroads transport from station to station, planes from airport to airport, trucks from point to point or from place to place. Taxpayer's argument (Br. 27) that the premises of the Getchell Mine are a point, which is premised upon the dictionary definition that point and place are sometimes synonymous, plainly ignores the ordinary use of the word "point" in reference to transportation by truck. This type of transportation is most often used from point to point upon a place or within a town. When so used, point is manifestly not synonymous with place if the latter is intended to mean a larger area than that necessary to load or unload a motor vehicle. The word "point" used in the applicable statute means a particular spot which is the point or place of origin and another spot which is the point or place of

destination. Even though the words point and place are synonymous, neither one nor both properly can be used to describe an area embracing all of the Getchell Mine property.

Taxpayer's argument, as applied to transportation during 1942 and later years and as it relates to the particular question under consideration here, ignores the known fact that "point" or "place" refers either to the origin of a shipment or to its destination. This is never a large area but always a designated spot within an area. The transportation in question in the instant case was from one spot to another spot upon the taxpayer's premises, necessarily from one point or place to another point or place upon the Getchell Mine property. The actual point of origin and the point of destination are shown with sufficient accuracy upon the map that was made part of the stipulation in this case (R. 19), showing the roads used by Dodge Construction, Inc., in transporting the taxpayer's ore. As used in this argument, the word "point" is surely free from reasonable doubt. Its use in the transportation tax statute manifestly refers to the "point of origin" and "point of destination" of any shipment by commercial carrier. The ordinary or settled meaning of a word prevails. *Avery* v. *Commissioner,* 292 U.S. 210, 214. We must assume that Congress had a reasonable understanding of the term it employed to express its intention and that it knew the then commercial usage of the word "point." *United States* v. *Van Nostrand,* 94 F. 2d 510, 512 (C.A. 1st).

Taxpayer's argument, if sound, exempts from the federal transportation tax all shipments of property by railroad

from one station to another and all movements of property by motor vehicles from a point of origin to a point of destination, whenever both stations or each point are located upon the same mine, ranch or property owned by the taxpayer. This conclusion, in effect, adds to the statutory language an exception to its literal meaning so that by construction the statutory phrase will read "from one point in the United States to another, excluding all transportation upon property of a person subject to the tax." If this be what Congress intended it readily could have said so, but it did not and we cannot assume it meant what it did not say. *United States* v. *Van Nostrand, supra,* p. 512. Taxpayer's broad interpretation of the language used by Congress amounts to a claim for tax exemption, something that is never granted by implication. *Oklahoma Tax Comm'n* v. *United States,* 319 U.S. 598, 606. If it be assumed, *arguendo,* that there is any justification for an argument that Congress should have made the tax inapplicable to transportation upon a taxpayer's farm, ranch, mine or other commercial property, then this goes to a policy matter concerning the wisdom of the legislation which is of no concern in a construction of language actually used. *Packard Co.* v. *National Labor Relations Board, supra; Utah Junk Co.* v. *Porter, supra.*

Taxpayer's conclusion that its entire mine property was (Br. 27) "a single place, point or locality" necessarily implies that Dodge Construction, Inc., could have hauled the ore to any spot on the entire Getchell Mine premises and dumped it at will. But that ore was not waste material which might have been disposed of by the carrier as it saw

fit. Dodge Construction, Inc., had a well defined route or routes of transportation from one spot to another. The map in evidence (R. 19) shows these spots to have been of relatively small area. They were designated by the taxpayer as the shipper of the ore. In such circumstances, any argument that "point" means the entire Getchell property appears to be futile and absurd. This is even more apparent when the situation here is contrasted with that covered in an inapplicable administrative ruling in M.T. 13, 1943 Cum. Bull. 1161, reading in part:

> Where a person contracts with a carrier for the transportation of waste material from his plant or premises to a designated place, the amount paid to the carrier is taxable under section 3475 of the Internal Revenue Code, since it is a payment for transportation of property from one point in the United States to another. However, an amount paid to a carrier for removal of waste material where the carrier is permitted to dispose of the material as it sees fit is not taxable under that section. The amount paid under such circumstances is considered as a payment for a disposal service rather than for the transportation of property from one point in the United States to another.

The decision in *Lyle* v. *United States,* 76 F. Supp. 787 (N.D. Ga.), cited on page 27 of the taxpayer's brief, and therein said to be similar on its facts to the case at bar, fairly cannot be apposite. The Court found that the transportation tax in that case was assessed against the plaintiff in an amount representing 3% of the payments made to his subcontractor for services rendered in furnishing dump trucks with drivers for use in the leveling and grading of an airfield. The dump trucks received earth from the grading shovel and moved it to the closely situated dump or fill

on the same field. In the circumstances the transportation was regarded as insignificant. Moreover, there was no finding that the subcontractor was engaged in the business of transporting property for hire, and the absence of a showing to this effect would defeat the tax. The facts of this case are entirely different. Here there was transportation of ore from the mine to stockpiles or the mill, two definite points of origin and destination, instead of merely a grading and filling operation on a field. Moreover, the transportation was done in this case by a company engaged in the business of transporting property for hire.

The liquor cases cited on page 30 of the appellant's brief are also inapposite. Those decisions and many others, including the *Liquor Transportation Cases,* 140 Tenn. 582, 593-594, 205 S. W. 423, 426, all to the same effect, show that state courts have rather uniformly held that the transportation of intoxicating beverages by any person upon and across his own premises was not enough to support a conviction for illegal transportation. Those decisions rest upon the premise that it was not unlawful for a person to procure and to consume liquor in his own home which necessarily could be done only if the liquor was moved or transported from place to place within and without the person's dwelling and upon his premises. The phrases "from one place to another" and "from one point to another," as used in the state criminal statutes, were held synonymous and held to mean not less than from one premises to another. There is no proper analogy to any issue in the instant case. Moreover, state law and decisions of state courts are controlling only when the federal taxing Act by express language or

necessary implication makes its operation dependent upon state law. *Lyeth* v. *Hoey,* 305 U.S. 188, 194.

CONCLUSION

The facts stipulated and found by the trial court are sufficient to support the judgment. The tax in controversy was lawfully collected upon an assessment which was duly and regularly made by the Commissioner of Internal Revenue. The decision of the District is correct and it should be affirmed.

Respectfully submitted,

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APPENDIX

Internal Revenue Code:

SEC. 3475 [as added by Sec. 620(a), Revenue Act of 1942, c. 619, 56 Stat. 798]. TRANSPORTATION OF PROPERTY.

(a) *Tax.*—There shall be imposed upon the amount paid within the United States after the effective date of this section for the transportation, on or after such effective date, of property by rail, motor vehicle, water, or air from one point in the United States to another, a tax equal to 3 per centum of the amount so paid, except that, in the case of coal, the rate of tax shall be 4 cents per short ton. Such tax shall apply only to amounts paid to a person engaged in the business of transporting property for hire, including amounts paid to a freight forwarder, express company, or similar person, but not including amounts paid by a freight forwarder, express company, or similar person for transportation with respect to which a tax has previously been paid under this section. In the case of property transported from a point without the United States to a point within the United States the tax shall apply to the amount paid within the United States for that part of the transportation which takes place within the United States. The tax on the transportation of coal shall not apply to the transportation of coal with respect to which there has been a previous taxable transportation.

* * *

(26 U.S.C. 1946 ed., Sec. 3475.)

Treasury Regulations 113 (1943 ed.):

SEC. 143.1 *Meaning of Terms.*—As used in these regulations, unless otherwise specified or indicated by the context—

(*a*) *General.*—The terms defined in the applicable provisions of law shall have the meanings so assigned to them.

(*b*) *Person engaged in the business of transporting property for hire.*—The term "person engaged in the business of transporting property for hire" includes a common carrier, contract carrier, local moving or drayage concern, freight forwarder, express company, or other person transporting property for hire wholly or in part by rail, motor vehicle, water, or air.

(*c*) *Carrier.*—The term "carrier" is coextensive with the term "person engaged in the business of transporting property for hire."

(*d*) *Transportation.*—The term "transportation" as used herein means the movement of property by a person engaged in the business of transporting property for hire, including interstate, intra state, and intracity or other local movements, as well as towing, ferrying, switching, etc. In general, it includes accessorial services furnished in connection with the transportation movement, such as loading, unloading, blocking and staking, elevation, transfer in transit, ventilation, refrigeration, icing, storage, demurrage, lighterage, trimming of cargo in vessels, wharfage, handling, feeding and watering live stock, and similar services and facilities.

(*e*) *Property.*—The term "property" means any physical matter regardless of value over which the right of ownership or control may be exercised, including currency, documents, papers of all kinds, etc.

(*f*) *Coal.*—The term "coal" as used herein includes

anthracite, bituminous, semibituminous, sub- bituminous, and lignite coal, coal dust, and coke, and briquettes made from coal.

(*g*) [as added by T.D. 5284, 1943 Cum. Bull. 1158] *Preparation plant.*—The term "preparation plant" means a plant operated in connection with mining operations at which coal is subjected to one or more processes, such as washing, crushing or sizing, intended to remove impurities or foreign matter or otherwise render the coal better suited for consumption, but not including a preparation plant operated as part of or in conjunction with any other establishment or place (such as a steel plant, coke oven, etc.) where coal is consumed as fuel or in the production of coke, briquettes, or other articles or materials.

* * *

SEC. 143.13 *Application of Tax.*—(*a*) [as amended by T.D. 5354, 1944 Cum. Bull. 657] *In general.*—The tax is payable by the person making the taxable transportation payment and is collectible by the person receiving such payment. (See section 143.50.)

The tax applies to the total amount paid within the United States for transportation of property from one point in the United States to another even though while en route part of the transportation movement is through a foreign country.

The tax applies to any payment, not specifically exempted, for the transportation of property, made to a person engaged in the business of transporting property for hire, including a payment made by one such person to another, but not including an amount paid by a carrier, a freight forwarder, express company, or

similar person for transportation with respect to which a tax is payable to such person.

The tax applies only to amounts paid after December 1, 1942, for transportation which originated on or after that date. No tax attaches to payments for transportation originating prior to the first moment of December 1, 1942. Payments made prior to December 2, 1942, are not taxable regardless of when the transportation occurs.

In the case of property transported from a point without the United States to a point within the United States the tax applies to any amount paid within the United States for that part of the transportation which takes place within the United States.

Where the amount paid in the United States covers the entire movement of property from point of origin in a foreign country to an inland point in the United States, the tax will apply to the pro rata part of such payment which represents transportation within the United States. However, in the case of shipments of foreign origin arriving by water, no tax will attach to transportation or services performed prior to the unlading of property at the port of first arrival.

The tax does not apply: (1) to an amount paid outside the United States for the transportation of property from a point without the United States to a point within the United States; (2) to an amount paid by a carrier, freight forwarder, express company, or similar person for the transportation of property with respect to which a tax is payable to such carrier, freight forwarder, express company, or similar person; or (3) to an amount paid for the transportation of property

in course of exportation or shipment to a possession of the United States and actually so exported or shipped (see section 143.30. For governmental exemptions see Subpart D.

(*b*) [as amended by T.D. 5284, 1943 Cum. Bull. 1158] *Coal.*—An amount paid after December 1, 1942, with respect to the first transportation for hire originating on or after that date of coal is subject to tax, except that an amount paid for the transportation of coal from the mine to a preparation plant as defined in section 143.1 (g) is not taxable, but the tax attaches to the first subsequent transportation for hire of the coal.

An amount paid for the transportation of coke or briquettes made from coal is not subject to tax, provided there has been a previous taxable transportation of the coal or coal dust from which such coke or briquettes were manufactured.

When a person delivers to a carrier a quantity of coal for a transportation movement, and the transportation tax has previously been paid with respect to the coal so delivered, a statement to that effect shall be endorsed on the bill of lading or other shipping papers. This endorsement shall constitute authority to the carrier not to collect tax with respect to the transportation charges due on such shipment.